REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

HELD AT MEGAWATT PARK, JOHANNESBURG

CASE NO: 13395

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED.

23 April 2021 ....
DATE SIGNATURE

Before: The Hon Mr Justice Adams (President)
Ms F Venter (Accountant Member)
Mr I Nkama (Commercial Member)

Date of Hearing: 3, 4 and 26 March 2021
Date of Judgment: 23 April 2021

In the matter between:

MR A Appellant

and

THE COMMISSIONER FOR
THE SOUTH AFRICAN REVENUE SERVICE Respondent

Heard: 3, 4 and 26 March 2021 – The 'virtual hearing' of the appeal was conducted as a series of videoconferences on the *Microsoft Teams* digital platform.

Delivered: 23 April 2021 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 23 April 2021.

Summary: Tax Court – capital gains tax (CGT) – taxpayer disposed of shares in SA company and related offshore company – shares in the group of companies regarded as 'asset' for purposes of CGT – 'base cost' determined on the basis of the combined shareholding in the related companies – 'base cost' determined by value of asset declared in application for amnesty and accepted by the SA Reserve Bank – Exchange Control Amnesty and Amendment of Taxation Laws Act 12 of 2003

ORDER

(1) The appellant's appeal against the revised assessment for the 2009 year of assessment is dismissed.

(2) The respondent is ordered to alter the 2009 assessment in terms of section 129(2)(*b*) of the Tax Administration Act, 28 of 2011, to reflect a capital gain to be included in the appellant's taxable income of R3 641 339,58.

(3) The 200% additional tax imposed by SARS in terms of section 76 of the Income Tax Act, Act 58 of 1962 (as it read at the time of imposition thereof), shall be altered and reduced from 200% to 25%.

(4) The interest imposed by SARS in terms of section 89*quat*(2) of the Income Tax Act is confirmed except that it shall be altered to be calculated on the basis of the altered assessment as per prayer (2) above.

(5) The penalty imposed by SARS in terms of paragraph 20 of the Fourth Schedule to the Income Tax Act is remitted *in toto.*

(6) The penalty imposed by SARS in terms of paragraph 20A of the Fourth Schedule to the Income Tax Act is remitted *in toto*.

(7) There shall be no order as to costs.

JUDGMENT

Adams J (Accountant Member *et* Commercial Member concurring):

[1] We have before us an appeal by the taxpayer in terms of section 107 of the Tax Administration Act, Act 28 of 2011 ('the TAA'), against the assessment of the taxpayer by the respondent ('the Commissioner') in respect of the 2009 tax year of assessment. The assessment is dated 30 August 2012 and was in the form of and titled 'Finalisation of Audit Letter: Revised Assessment'. The effect of the revised assessment was in essence to

adjust the taxpayer’s assessed income for the 2009 tax year and to bring into account additional income earned by the taxpayer during that year, which he purportedly omitted to disclose.

[2] What is important for purposes of this judgment is that the Commissioner, in the revised assessment, found that during the 2009 tax year (in January 2009) the taxpayer had disposed of his shares in BCD (Pty) Limited (‘BCD SA’), making him liable for Capital Gains Tax in addition to interest and additional penalty taxes. The parties refer to BCD (Pty) Limited as ‘BCD SA’ and I shall do likewise. It is a South African company which was registered and incorporated during 1998, but was reportedly dormant until about 2003/2004.

[3] In terms of the aforesaid revised assessment, the taxpayer was held liable for additional taxes and the total amount of his tax liability, inclusive of the additional taxes, amounted to R23 124 966, of which R10 618 223 related to ‘capital gain on disposal of business interest’. On 2 November 2012 the taxpayer objected to the revised assessment, which objection in the end and after an extended period of time and lengthy discussions and other alternative dispute resolution processes – after the initial appeal stages – was disallowed by the Commissioner in respect of the capital gains tax levied and the related interest imposed in terms of section 89*quat*(2) of the Income Tax Act, Act 58 of 1962 (‘the Income Tax Act’) and additional penalty taxes.

[4] It is against this decision by the Commissioner to disallow the objection that the taxpayer appeals to this court.

[5] To the extent that this appeal involves matters of law, this judgment and the order is my own. To the extent that issues of fact were considered and decided, the learned accountant member and commercial member concur with my findings.

[6] In a nutshell, the issue in this appeal is whether the taxpayer is liable for capital gains tax (CGT) as a result of the sale of his shares in January 2009 in BCD SA. If so, then the question is how that CGT is to be calculated. In that regard, the issues to be decided are: (1) What were the proceeds from the sale of the shares? and (2) What was the base cost of the shares?

[7] It may be apposite at this point to briefly refer to the most relevant legislative provisions to place in context the issues which require adjudication.

[8] ‘Capital gains tax’ was introduced into this country with effect from 01 October 2001 by way of the Eighth Schedule to the Income Tax Act. Reduced to the essentials and with a little simplification in order to assist the narrative, the essential factor to which regard is had is the difference between the amount at which a person acquires a capital asset and the amount

of the proceeds received on its subsequent disposal. Should such proceeds exceed the amount at which it was acquired, there is a capital gain. Conversely, should the proceeds from the subsequent disposal of the asset be less, there will be a capital loss. The aggregate of capital gains and capital losses are then taken into account to calculate a net capital gain (this being the difference between the aggregate capital gain of a year and the aggregate capital loss of the previous year) and a percentage then applied to the net capital gain to calculate the taxable capital gain for the year of assessment. In terms of section 26A of the Act, that taxable capital gain then falls to be included in the taxable income of the person concerned.

[9] The governing provisions are contained in the Eighth Schedule of the Income Tax Act. At the relevant time, section 26A of the Income Tax Act provided as follows:

> **'26A Inclusion of taxable capital gain in taxable income** – There shall be included in the taxable income of a person for a year of assessment the taxable capital gain of that person for that year of assessment, as determined in terms of the Eighth Schedule.'

[10] Paragraph 2 of the Eight Schedule to the Act ('the Eight Schedule') provided *inter alia* that the Eighth Schedule applied to the disposal on or after the valuation date of any asset of a resident. The Eighth Schedule therefore applied to assets owned and disposed of by the taxpayer, who is a resident, and paragraph 1 defined 'asset' as including:

> '(*a*) property of whatever nature, whether movable or immovable, corporeal or incorporeal, excluding any currency, but including any coin made mainly from gold or platinum; and
>
> (*b*) a right or interest of whatever nature to or in such property;'

[11] Paragraph 11 provides as follows:

> **'11. Disposals**—Subject to subparagraph (2), a disposal is event, act, forbearance or operation of law which results in the creation, variation, transfer or extinction of an asset,'

[12] Paragraph 3 defines a capital gain as follows:

> **'3. Capital gain—**A person's capital gain for a year of assessment, in respect of the disposal of an asset—
>
> (*a*) during that year, is equal to the amount by which the proceeds received or accrued in respect of that disposal exceed the base cost of that asset;'

[13] Paragraph 4 defines a capital loss as follows:

> **'4. Capital loss—**A person's capital loss for a year of assessment in respect of the disposal of an asset—
>
> (*a*) during that year, is equal to the amount by which the base cost of that asset exceeds the proceeds received or accrued in respect of that disposal.'

[14] In terms of paragraph 35, proceeds from the disposal of an asset by a person 'are equal to the amount received by or accrued to that person in respect of that disposal'.

[15] Although paragraph 20 of the Eighth Schedule provides in considerable detail for the determination of base cost in particular circumstances, it is in simple terms set out in paragraph 20(1)(a) as being 'the expenditure actually incurred in respect of the cost of acquisition or creation of that asset'. And the determination of the base cost of an asset also depends on whether the asset was acquired before 01 October 2001 or thereafter.

[16] Lastly, in regard to the applicable legislative provisions, section 102 of the TAA, dealing with the onus of proof in tax and tax related matters, reads as follows:

> '(1) A taxpayer bears the burden of proving—
>
> (*a*) that an amount, transaction, event or item is exempt or otherwise not taxable;
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> (*b*) that an amount or item is deductible or may be set off;
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> (*c*) the rate of tax applicable to a tax transaction, event, item or class of taxpayer;
>
> (*e*) that the amount qualifies as a deduction of tax payable;
>
> (*f*) that a valuation is correct; or
>
> (*g*) whether a "decision" that is subject to objection and appeal under a tax Act is incorrect.
>
> (2) The burden of proving whether an estimate under section 95 is reasonable or the facts on which SARS based the imposition of an understatement penalty under Chapter 16, is upon SARS.'

[17] That brings me back to the salient facts in the matter, which are set out in the paragraphs which follow. These facts are gleaned from the evidence led during the hearing of the appeal, as well as from documentation placed before the court. In that regard, the Commissioner called no witnesses, whereas the taxpayer relied on his own evidence, as well as on the evidence of an expert witness, Mr Z, a Chartered Accountant with a special interest in tax. Having regard to the evidence, the facts in the matter are by and large common cause.

[18] By all accounts, the taxpayer is a man of considerable wealth, which he acquired for the most part in operations and from businesses outside of the borders of the Republic of South Africa. By about 2003, the assets the taxpayer had acquired and the wealth which he had accumulated through his offshore business operations had resulted in his personal nett worth exceeding R119 million. Of this R119 million, R95 389 436 (as per the amnesty application figures as at 28 February 2003 – US$11 937 258 X the agreed US$/ZAR foreign exchange rate of 7,9909) was constituted by the taxpayer's 82% shareholding in a company by the name of BCD Corporation, an offshore company registered and incorporated in the British Virgin Islands. It is the case of the taxpayer that it was this interest in BCD Corporation

which was in fact disposed of by him during January 2009 and which forms the subject of the capital gains tax levied by the Commissioner, to which he objected.

[19] During 2003, by an application for amnesty in terms of the Exchange Control Amnesty and Amendment of Taxation Laws Act, Act 12 of 2003, the taxpayer commenced the process of repatriating back to South Africa his wealth and assets, which at that stage was residing offshore. It bears emphasising that such wealth and assets were accumulated and earned by income generated by the taxpayer over a number of years whilst he was not resident in South Africa. The purpose of the amnesty application was obviously to regularise his tax affairs and to bring his assets back to South Africa.

[20] To that end, the taxpayer disclosed to the Revenue Authorities that he owned 82% shares in BCD Corporation, which were valued – and which valuation was accepted by the South African Reserve Bank – at US$11 937 258,24. The prevailing US Dollar – South African Rand exchange rate at the time was ZAR7,9909 to US$1,00. This means that the taxpayer's shareholding in BCD Corporation was worth R95 389 436,60. The acceptance of this valuation by the South African Reserve Bank plays an integral part in the case of the taxpayer, who contends that that is the amount which should form the basis for the assessment of the base cost of the BCD SA shares disposed of during January 2009. I will revert to this aspect of the matter later on in the judgment.

[21] The disposal of all of the BCD SA shares was in terms of a written Sale of Shares Agreement dated 29 January 2009 ('the agreement') between all of the shareholders of BCD SA, including the taxpayer, and Sail Group Limited ('the Sail Group'). The agreement expressly provided for the sale to the Sail Group of 100% of the issued share capital of BCD SA, comprising 1000 ordinary shares with a par value of one rand each. Five hundred and thirty-one of those BCD SA shares, representing 53.1% thereof, were owned at the date of the sale of the shares by the taxpayer.

[22] The aggregate purchase price 'due and payable to' the taxpayer for the sale of his BCD SA shares 'in cash and/or in SAIL Shares' was the sum of R66 364 587, payable as follows:

(a) R27 944 485 in cash on the implementation date – that being 8 January 2009 and seven days after fulfillment of all of the suspensive conditions of the agreement. This amount was in fact paid to the taxpayer during February 2009.

(b) R15 264 000 – by the allotment and issue to the taxpayer of the equivalent of SAIL Group shares to the value of R16 591 304; and

(c) R23 156 102 – on the third anniversary of the implementation date, therefore during January 2012, subject to certain warranty clauses and breach provisions in the agreement.

[23] In the words of paragraph 35 of the Eighth Schedule, the taxpayer, to my mind, disposed of his BCD SA shares on 29 January 2009 and the proceeds from such disposal in the form of the purchase price undoubtedly amounted to R66 364 578. The point is that as a result of the sale of his shares to the Sail Group an amount of R66 364 578 had accrued to the taxpayer on the said date – that much is clear from the express wording of the agreement and no interpretation thereof is required. As was held by the AD a century ago in *Lategan v CIR*,[1] the words in the Act 'has accrued to or in favour of any person', simply means 'to which he has become entitled'.

[24] Moreover, in *Mooi v SIR*,[2] it was held that a contingent right conditional upon the fulfilment of certain conditions cannot be regarded as an 'amount' for the purposes of the definition of 'gross income', even though such a right possesses a money value at the time it is acquired by a taxpayer. Such a contingent right does no more than 'set up the machinery for creating a benefit', and the benefit accrues only when all conditions attaching to the right are fulfilled.

[25] The suspensive conditions contained in the agreement provide that certain events must take place before 30 January 2009 and/or 2 February 2009. The taxpayer gave evidence that he received the first payment from the Sail Group in February 2009. Therefore, the ineluctable inference to be drawn is that all of the suspensive conditions were fulfilled. If not, there would not have been payment to him of the first instalment payable. Therefore, in my view R66 364 578 'accrued' to the taxpayer when he sold his shares in BCD SA on 29 January 2009. That amount therefore represents 'the proceeds received or accrued' in respect of the disposal of the BCD SA shares.

[26] Insofar as the taxpayer places reliance on the on so-called 'warranty claims' that reduced the share price, Mr L SC, who appeared with Mr M for the Commissioner, argued that those ought to have been dealt with in terms of paragraph 35(3)(*c*) of the Eighth Schedule, which provides as follows:

> 'The proceeds from the disposal, during a year of assessment, of an asset by a person, as contemplated in sub-paragraph (1), must be reduced by—
>
> (*a*) . . . . . .

[1] *Lategan v CIR* 1926 CPD 203.

[2] *Mooi v SIR* 1972 (1) SA 675 (A) (34 SATC 1).

> (*c*) any reduction, as a result of the cancellation, termination or variation of an agreement, other than any cancellation or termination of an agreement that results in the asset being re-acquired by the person that disposed of it …'.

[27] I find myself in agreement with this submission. In any event, there was no evidence before the Court that the agreed sales price, in terms of the agreement, had been reduced as a result of warranty claims. The taxpayer's evidence was that there was a reduction in the purchase price, but he could not remember to what amount the purchase price had been reduced to. If that was indeed the case, then, as argued by Mr L, the taxpayer should have claimed a reduction in the selling price in the year in which that event occurred, which would have been subsequent to the 2009 year of assessment when a capital gain should have been declared and paid by him.

[28] What is beyond doubt is that the taxpayer failed to disclose to the Commissioner the aforesaid disposal in circumstances in which he was undoubtedly under a legal obligation to do so. His explanation for not making such disclosure, notably that he relied on advice received from professional advisors and that he viewed the fact that the sale agreement was subject to a number of suspensive conditions as an indication that the purchase had not yet accrued, is untenable.

[29] Simultaneously with the sale of the BCD SA shares, and as part and parcel of the same written agreement of sale dated 29 January 2009, the taxpayer also sold to the Sail Group all of his shares in BCD Corporation, which, as already indicated, was an offshore company registered and incorporated in the British Virgin Islands. The taxpayer also owned 531 of the 1000 issued shares in BCD Corporation by the date of the Sale of Shares Agreement. Much confusion and perceived complications resulted from this related transaction, which, according to the taxpayer, should have been looked at and considered as part and parcel of one and an indivisible disposal of an asset by the taxpayer, that being his interest and shareholding in all of his companies, being companies and subsidiaries in a group of companies.

[30] The Commissioner disagrees with the taxpayer's contention that the disposal of the BCD SA shares and the BCD Corporation shares should be treated, for purposes of Capital Gains Tax or Capital Losses Tax, as the acquisition and disposal of one asset. A legal interpretation of the Eighth Schedule, so Mr L submitted, lends itself to the conclusion that assets acquired and disposed of, including shares in separate companies, should, for purposes of CGT, be treated separately and distinctly.

[31] Mr L therefore submitted that the sale of the BCD Corporation shares should be completely disregarded. This transaction was also not disclosed by the taxpayer and, if there was a capital loss, the details thereof were not declared by the taxpayer during the relevant tax year. Therefore, so the argument on behalf of the Commissioner goes, no capital loss

exists to be set off against the capital gain realised when the BCD SA shares were disposed of.

[32] This then means, so the Commissioner argues, that the starting point of the adjudication of the appeal is that, during the 2009 tax year, the taxpayer disposed of his BCD SA shares for an amount of R66 364 578. The only question which remains is what is the base cost of those shares disposed of. A related enquiry is when did the taxpayer acquire those shares. By all accounts the BCD SA shares were acquired on 01 September 2004, as evidenced by a share certificate discovered by the taxpayer.

[33] The base costs should simply be calculated, so the Commissioner contends, on the basis that the taxpayer acquired the 531 shares on 01 September 2004 – the date on which the shares were issued – at R1,00 par value, therefore R531, and the capital gain assessed on that basis.

[34] This approach finds support in a share certificate discovered by the taxpayer, which confirms that he acquired five hundred and eleven shares in BCD SA on 01 September 2004 and another forty later. The nominal value of the issuing of the shares was reflected as one South African rand. All things considered, and having regard to the wording of paragraph 20(A) of the Eighth Schedule, which provides that the base cost of an asset acquired after 01 October 2001 is ‘the expenditure actually incurred in respect of the cost of acquisition or creation of that asset’, the Commissioner is of the view that this amount constitutes the base cost of the taxpayer’s shareholding in BCD SA. He therefore submits that the base costs should be 531 × R1.00 = R531.

[35] The case of the taxpayer, in regard to the base cost of the asset disposed of, is to a large extent grounded on the amnesty application he filed with the Reserve Bank during 2003, and which application was granted on 27 October 2004. The taxpayer’s case on the pleadings is that the valuation done for the amnesty application, of the BCD Corporation shares, constitutes a valuation as required and therefore there was a capital loss when the BCD Corporation shares were disposed of. As indicated in the paragraphs which follow, I agree with this approach but only to a certain extent. Importantly, I am of the view that the value of the shares in BCD Corporation as per the amnesty application should be accepted as the market value thereof at the time of the application for amnesty.

[36] In my view, there is merit in the approach proposed by the taxpayer, that being that all of the shares held by the taxpayer in the group of companies should, for purposes of the assessment of CGT, be treated as one ‘asset’ as defined in the Eighth Schedule. When I refer to a ‘group of companies’, I do so in the context of CGT and therefore to companies in which the taxpayer holds shares. I do not necessarily intend to make reference to a ‘group of

companies' in the strict legal technical sense, such as, for example, with reference to the definition contained in section 41(1) of the Income Act. The point is that the case put forward by the taxpayer is exactly that the two companies in which he is a shareholder should be treated as if he holds shares in one company. The point is that these two companies are, for purposes of this dispute a 'group'. The case relates to shares in an offshore company, which the taxpayer, by the amnesty application process, intended to repatriate.

[37] The base cost of that asset should be determined on the basis that it was acquired on 01 September 2004 – the date on which the shares in BCD SA were issued to the taxpayer. The market value of those shares should be established and that is done by reference to the amount declared to and accepted by the Fiscus, as being the fair value of those shares, pursuant to the amnesty application, which was approved by the Reserve Bank. The declaration by the taxpayer in support of the amnesty application was made on 25 February 2004 and related to the period as and at 28 February 2003. In terms of this declaration, the taxpayer had an 82% Shareholding in the BCD Group of Companies – that being BCD Corporation at that stage – valued at R95 389 436,60.

[38] I agree that this can and should be accepted as a basis for the base cost of the asset disposed of by the taxpayer on 29 January 2009, subject to the provisos as set out in the following paragraphs.

[39] Firstly, as and at 28 February 2003 or thereabout, the taxpayer owned 82% of the shares in the BCD Group of Companies, consisting at that stage only of BCD Corporation. On 29 January 2009 only 53,1% shareholding in the Group – then consisting of BCD SA and BCD Corporation – was disposed of, which means that the base cost of 53,1% of the shareholding should be determined by pro-rating the value as follows: US$14 557 632 × 7,99 (exchange rate) × 53.1% = R61 763 519,70.

[40] This approach, based to a large extent on inferential reasoning, is necessitated by the fact that the taxpayer gave no indication of what happened in between the time when he owned 82% shares in the two entities and the time when that shareholding had been reduced to 53,1% – that is the period between 2003 to 2009. There is an indication that the shareholding of the entities was restructured and new shares issued to other stakeholders, which resulted in a dilution of his shareholding. However, little details of these transactions are provided. The inference to be drawn therefore is that the taxpayer disposed of his 28,9% shareholding to other shareholders. This disposal was however not disclosed to the Commissioner. I therefore conclude that what the taxpayer disposed of during January 2009 was only 53,1% of the 82% shareholding he owned during 2004, the balance having been disposed of between 2003 and 2009.

[41] In that regard, paragraph 12 of the Eighth Schedule may very well find application. It provides in essence that disposals and acquisitions by a person, who becomes a resident, must be treated as having disposed of an asset for an amount received or accrued equal to the market value of the asset and to have immediately reacquired the asset at an expenditure equal to that market value. Also paragraph 39 provides that, when determining capital gain, certain disposals to connected persons should be disregarded.

[42] Secondly, it should be borne in mind that not all of the value in BCD Corporation was transferred into BCD SA. What was left in BCD Corporation was shareholding in three of the fifteen companies in which it previously held shares, the other twelve having been transferred to BCD SA in terms of and pursuant to a merger agreement concluded between the companies in the Group and all the shareholders on or about 01 November 2003.

[43] So, by the date of the Sale of Shares Agreement on 29 January 2009 there were two companies left in the Group, namely BCD SA and BCD Corporation – and the taxpayer was a 53,1% shareholder in the Group. The asset he disposed of then was all of his shares in those companies and the proceeds which accrued to him as a result of that disposal was R76 344 878, calculated as follows: R66 364 578 (proceeds from the sale of 53.1% of the shares in BCD SA) + R9 980 300 (proceeds from the sale of 53.1% of the shares in BCD Corporation).

[44] I am inclined to agree that this approach accords with the letter and the spirit of the relevant provisions of the Eighth Schedule. It translates into the following calculation: R66 364 578 (proceeds of sale of BCD SA shares) + R9 980 300 (proceeds of sale of BCD Corporation shares) less R61 763 519,70 (base cost) = R14 581 358,30, less R16 000 (annual exclusion) = R14 565 358,30 (nett capital gain). At an inclusion rate of 25%, which is also common cause between the parties, the CGT is payable by the taxpayer on the amount of R3 641 339,58.

[45] I am therefore of the view that the taxpayer’s tax liability ought to have been assessed on the basis that a nett capital gain was realised by the sale of the shares in an amount of R14 565 367,29, making him liable for CGT on R3 641 339,58. An order to that effect should therefore follow.

[46] From the aforegoing, it is clear that the assessment before us does not correctly reflect the capital gain realised by the taxpayer, when he disposed of his BCD SA Shares and, for that matter, of his BCD Corporation shares. As indicated, the capital gain to be included in the taxpayer’s taxable income is the amount of R14 565 367,29.

[47] This Court has the jurisdiction to alter the assessment, in terms of section 129 of the TAA, in terms of which the court may make the following order:

> '(2) (a) confirm the assessment or "decision";
> (*b*) order the assessment or "decision" to be altered;
> (*c*) refer the assessment back to SARS for further examination and assessment;
> (*d*) . . . . .;
>
> (3) In the case of an appeal against an understatement penalty imposed by SARS under a tax Act, the tax court must decide the matter on the basis that the burden of proof is upon SARS and may reduce, confirm or increase the understatement penalty.
>
> (4) If SARS alters an assessment as a result of a referral under subsection (2)(*c*), the assessment is subject to objection and appeal.'

[48] In *ABC (Pty) Ltd v CSARS*,[3] the Court (per Satchwell, Makume and Mali JJ) held as follows in respect of section 129(2) of the TAA:

> '[117] This is not a court of inherent jurisdiction. As a creature of statute it enjoys only those statutory powers granted to it. Section 129(2) of the TAA empowers the court, in the case of an assessment under appeal, to exercise a discretion to do one of three things: To "confirm" or to "alter" or to "refer an assessment back" to SARS for reconsideration.'

[49] The meaning of 'alter' and 'referred back to SARS' as used in section 129(2)(*b*) and (*c*) was held to mean the following:

> '[132] The distinction seems clear. Subsection (*b*) envisages that when an assessment is ordered to be "altered", the assessment is changed or modified in identified respects but the assessment is not completely transmuted or transmogrified into an entirely new entity comprising new DNA. Subsection (*c*) envisages that the assessment is referred back to the creator thereof, SARS, for a further process of investigation so as to test the subject matter and derive at a further result.'

[50] *ABC* also held that the powers of the Tax Court are the following:

> '[138] This is a court of revision and may therefore take into account all evidence presented at the hearing, exercise its own discretion and make its own decision and thus act in terms of subsection (*b*) by making an order as to the alteration to be effected by SARS. It is because subsection (*b*) is within the powers of this court we are also able to exercise a discretion to literally operate as a court of arithmetical revision.'

[51] The Court, in *ABC*, also considered when it would be appropriate to make an order in terms of section 129(*b*) and held:

> '[141] Subsection (*b*) is an appropriate tool where a portion of the original assessment can be set aside with clarity, where the taxpayer has not been taken unaware and proper notice

[3] *ABC (Pty) Ltd v CSARS* Johannesburg Tax Court (13251, VAT 1077) [2013] ZATC 13 (16 May 2018).

> has been given of the proposed alteration, where the provenance of the alteration is known to all and has been carefully examined by both SARS and the taxpayer and the court, where there can be no prejudice to either the taxpayer or to SARS, where a matter is brought to finality and it is appropriate so to do.'

[52] It is an important consideration that finality should be brought to the matter. If the assessments are referred back to SARS, in terms of section 129(*c*) of the TAA, the whole process starts afresh. In that regard, *ABC* held:

> '[147] Subsection (*b*) is an appropriate tool where finality can be brought to a dispute where there has been compliance with the imperatives of fairness and reasonableness and rationality. Subsection (*c*) is the only option available to a court where such finality should not be sought by reason of, inter alia, absence of notice, no foundation for the provenance of any proposed alteration, paucity of evidence, lack of explanation, obscurity of methodology / figures / calculations as opposed to clarity thereon, lack of opportunity to challenge proposed alterations or offer postulations of other alterations, where the court overreaches by performing the function of SARS rather than having regard to the evidence of SARS, the Taxpayer, experts and relying upon their methodology and computations.
>
> [148] In the present matter, it is difficult to concede what useful purpose could be served by the court sending SARS back to the drawing board in terms of subsection (*c*). The examination has already taken place by the SARS assessor and the three independent accountant expert witnesses and all involved in this litigation. It is difficult to envisage what further examination could take place and none has been suggested.'

[53] On appeal to the SCA, the *ABC* judgment and its reasoning were confirmed in *Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service*,[4] At paras 51 and 52, the SCA held as follows:

> '[51] The question whether an alteration of an assessment is competent must, like the issue of reasonableness of an assessment or the methodology used to determine the amount of an estimated assessment, be answered in the light of the facts and circumstances of each case. It is not necessarily determined by the magnitude, in monetary terms of the alteration but is dictated by considerations of fairness, with due observance of the *audi alteram partem* principle.'

[52] The point of departure should always be that the tax court is a court of revision and "not a court of appeal in the ordinary sense". The Legislature intended that there could be a rehearing of the whole matter by the Special Court and that the Court could substitute its own decision for that of the Commissioner, if justified on the evidence before it. A tax court accordingly rehears the issues before it and decides afresh whether an estimated assessment is reasonable. It is not bound by what the Commissioner found. In rehearing the case it can

[4] *Africa Cash and Carry (Pty) Ltd v Commissioner, South African Revenue Service* 2020 (2) SA 19 (SCA).

either uphold the opinion of SARS or overrule it and substitute it with its own opinion. The powers of the Tax Court and its functions are unique. It places itself in the shoes of the functionary and re-evaluates the facts and circumstances of the subject matter on which the assessments were based …'.

[54] In paragraphs [57] and [58] the SCA held:

> '[57] A tax court does not have inherent jurisdiction. However, if the evidence before it does not sustain the amount determined in an estimated assessment of a taxpayer's liability, or it determines that the amount in the estimated assessment is unreasonable then, subject to constitutional principles and compliance with the *audi alteram partem* principle, and fairness, provided that the basis for taxation is not now entirely different, and provided the court has all the information it requires to decide the matter before it, a tax court can alter an assessment, rather than refer the assessment back to SARS.
>
> [58] Such an alteration, if in compliance with the aforesaid principles and justified on the facts as reasonable, will fall within the powers conferred in s 129(2)(b) of the Act, accordingly be competent … the tax court will simply be discharging one of its core functions.'

[55] *In casu*, applying these aforesaid principles, I intend ordering the assessment to be altered in terms of section 129(2)(*b*). I do not think that the matter should be referred back to SARS in terms of section 129(2)(*c*) – it would be unfair and unreasonable to do so. I say so for the simple reason that, in the circumstances of this matter and if one considers the time period which has elapsed since the revised assessment, that being some nine years, the matter and the parties require finality. Moreover, in my judgment, there is no need for any further examination and investigation – all of the issues have been thoroughly and extensively canvassed by all concerned, including the taxpayer himself, and were therefore adequately ventilated. In the interested of fairness and reasonableness, the assessment stands to be altered.

[56] As regards additional tax, the provisions of section 76 of the Income Tax Act (which has since been repealed) are applicable. It reads as follows:

> 'A taxpayer shall be required to pay in addition to the tax chargeable in respect of his taxable income—
>
> (*a*) if he makes default in rendering a return in respect of any year of assessment, an amount equal to twice the tax chargeable in respect of his taxable income for that year of assessment; or
>
> (*b*) if he omits from his return any amount which ought to have been included therein, an amount equal to twice the difference between the tax as calculated in respect of the taxable income returned by him and the tax properly chargeable in respect of his taxable income as determined after including the amount omitted;

> (*c*) if he makes an incorrect statement in any return rendered by him which results or would if accepted resulted in the assessment of the normal tax at an amount which is less than the tax properly chargeable, an amount equal to twice the difference between the tax as assessed in accordance with the return made by him and the tax which would have been property chargeable.'

[57] In terms of section 76(2) the Commissioner 'may remit the additional charge imposed under subsection (1) or any part thereof as he may think fit: Provided that, unless he is of the opinion that there were extenuating circumstances, he shall not so remit if he is satisfied that any act or omission of the taxpayer referred to in paragraph (*a*), (*b*) or (*c*) of subsection (1) was done with intent to evade taxation'.

[58] In my view, the taxpayer's liability for additional taxes arises in the main from his failure to disclose the disposal of his shares during the 2009 tax year. His reason for this omission, he places at the door of his professional advisors and he also places undue emphasis on the fact that he had been granted amnesty by the South African Reserve Bank on 27 October 2004. I have difficulty in understanding how the taxpayer, given his vast experience and exposure in the business world, could have been under the impression that the once-off amnesty exonerated and relieved him from acting in the future as a responsible taxpayer.

[59] *In casu* the taxpayer did not disclose in his income tax return for the 2009 year of assessment that he realised a capital gain on the sale of the BCD SA shares. The taxpayer did, however, disclose a capital loss in his 2011 return when he disposed of the Sail shares acquired in terms of the Sale of Shares Agreement of 2009. The taxpayer therefore wanted to claim a capital loss but failed to disclose the capital gain that, on his own version, he realised already in 2009.

[60] The appellant does not plead any extenuating circumstances in his rule 32 statement. He only alleges that he placed reliance on the content of the approval of his amnesty application. He does not provide any additional information or motivation for this reliance. On the taxpayer's own version, he received part-payment already in February 2009 as well as the Sail shares, which he received as part-payment for selling his shares.

[61] The taxpayer's contention that there were suspensive conditions that first had to be fulfilled before he could declare the proceeds from the sale of the shares, is misplaced. There was an actual receipt of money and the balance of the money was not subject to any suspensive condition, or at least no evidence was tendered that there was a suspensive condition that was not fulfilled. Furthermore, the taxpayer claimed a capital loss in respect of the disposal of the Sail shares in 2011. This claim of a capital loss was made before the initial selling of the BCD SA shares was declared to SARS, which already occurred in 2009. The Sail

shares were given to the taxpayer as part-payment in 2009, yet he did not disclose that in his 2009 return.

[62] The point is that, howsoever one views this matter, there is no justification for the taxpayer's failure to disclose to the Commissioner that during the 2009 tax year he disposed of an asset and realised from such disposal a substantial sum of money running into tens of millions of rand. This is so despite the taxpayer's claim that he was of the view that the disposal should be disclosed only after the suspensive conditions were fulfilled and the warranties complied with.

[63] What does however count in favour of the taxpayer and what may possibly amount to an extenuating circumstance is the fact that the CGT he was assessed to be liable for was way in excess of what this court determines such liability to be. It is also so that during the assessment and appeal processes, the taxpayer was at all times fully cooperative and tried to assist, as far as he could, in resolving the dispute. My inclination would therefore be not to confirm the 200% additional tax imposed by SARS, but to reduce it to 25%.

[64] As regards the interest payable in terms of section 89*quat*(3) of the Income Tax Act, the relevant provision reads as follows:

> '(3) Where the Commissioner having regard to the circumstances of the case, is satisfied that any amount has been included in the taxpayer's taxable income or that any deduction, allowance, disregarding or exclusion claimed by the taxpayer has not been allowed, and the taxpayer has on reasonable grounds contended that such amount should not have been included or that such deduction allowance, disregarding or exclusion should have been allowed, the Commissioner may, subject to the provisions of section 103(6) direct that interest shall not be paid by the taxpayer on so much of the said normal tax as is attributable to the inclusion of such amount or the disallowance of such deduction, allowance, disregarding or exclusion.'

[65] As submitted by Mr L, the interest imposed in terms of section 89*quat* compensates SARS for the fact that the taxpayer under declared his provisional income. The taxpayer advanced no reasons in his pleadings why the interest payable in terms of section 89*quat* should not be imposed. No reasonable grounds were pleaded or established in evidence. Consequently, there is no basis to remit the section 89*quat* interest imposed by SARS, albeit that the interest would be payable on the reduced amount of CGT liability.

[66] As regards the penalty imposed for the taxpayer's failure to submit an estimate of taxable income timeously, SARS imposed a penalty in terms of paragraph 20A of the Fourth Schedule to the Income Tax Act for the appellant's failure to submit provisional tax returns.

[67] At the time paragraph 20A read as follows:

> 'Subject to the provisions of subparagraphs (2) and (3), where any provisional taxpayer is liable for the payment of normal tax in respect of any amount of taxable income derived by that provisional taxpayer during any year of assessment and the estimate of his or her taxable income for that year required to be submitted by him or her under paragraph 19(1) during the period contemplated … was not submitted by him or her on or before the last day of that year … the taxpayer shall, unless the Commissioner has estimated the said taxable income under paragraph 19(2) or has increased the amount thereof under paragraph 19(3), be required to pay the Commissioner, in addition to the normal tax chargeable in respect of such taxable income, an amount by way of additional tax equal to 20 per cent of the amount by which the normal tax payable by him or her in respect of such taxable income exceeds the sum of any amounts of provisional tax paid by him or her in respect of such taxable income … .'

[68] In terms of paragraph 20A(2) the Commissioner may remit, in whole or any part of the additional tax so imposed if he is satisfied that there was no intent to evade or postpone the payment of provisional tax.

[69] This aspect of the matter brings us back to the fact that the taxpayer failed to disclose to SARS that he had received a substantial sum of money, running into tens of millions of rand, in circumstances where he clearly was under a legal obligation to do so, even if he was under the impression – for whatever reason – that he was not liable for additional taxes.

[70] The point is however that the taxpayer did not believe that he should disclose the disposal of the shares for the reasons alluded to. He is being penalised for that and it seems innately unfair for him to be punished twice. The penalty in terms of paragraph 20A of the Fourth Schedule therefore stands to be remitted *in toto*.

[71] Lastly, paragraph 20 of the Fourth Schedule to the Income Tax Act at the time determined that:

> '20(1) If the actual income, as finally determined under the Act, for the year of assessment in respect of which the final or last estimate of his or her taxable income is submitted in terms of paragraph 19(1)(a) by a provisional taxpayer other than a company, or the estimate of his taxable income in respect of the period contemplated in paragraph 23(b) is submitted … is—
>
> (*a*) more than R1 000 000 (one million rand) and such estimate is less than 80 per cent of the amount of the actual taxable income the Commissioner may, if he or she is not satisfied that the amount of such estimate was seriously calculated with due regard to the facts having bearing on or was not deliberately or negligently understated, subject to the provisions of subparagraph (3), impose, in addition to the normal tax chargeable in respect of the taxpayer's taxable income for such year of assessment, an amount by way of additional tax up to 20 per cent of the difference between the amount of normal tax as calculated in

> respect of such estimate and the amount of normal tax calculated, at the rates applicable in respect of such year of assessment, in respect of the taxable income equal to 80 per cent of such actual taxable income.'

[72] The same reasoning applied *supra* relative to the paragraph 20A penalty applies to the paragraph 20 penalty, which therefore stands to be remitted.

Costs

[73] Section 130 of the TAA states:

> '(1) The Tax Court may, in dealing with an appeal under this Chapter, and on application by an aggrieved party, grant an order for costs in favour of the party, if—
>
> (a) the SARS grounds of assessments or decision are held to be unreasonable;
>
> (b) the Appellant's grounds of appeal are held to be unreasonable.
>
> (2) The costs referred to in sub-section (1) must be determined in accordance with the fees prescribed by the Rules of the High Court.'

[74] Mr L submitted that the taxpayer's grounds of objection are unreasonable for the reasons which follows.

[75] Firstly, the only reason advanced by the taxpayer why the BCD SA shares should not be subject to capital gains tax, was that he submitted an amnesty application. The amnesty application, however, was not in respect of the BCD SA shares but in respect of the BCD Corporation shares. The BCD SA shares, on the taxpayer's own version, was only acquired by him on 01 September 2004 after he submitted the amnesty application on 25 February 2004.

[76] Secondly, insofar as the taxpayer contends that there was an assessed loss in respect of the disposal of the BCD Corporation shares, the taxpayer failed to submit the tax return to establish an assessed loss. Therefore, the taxpayer had no basis to rely on any assessed loss in respect of the sale of the BCD Corporation shares.

[77] Thirdly, the taxpayer failed to take the Court in his confidence and explained what happened between 2004 and 2009 that reduced the Swazi Trust's shareholding in BCD Corporation from 82% to 53,1%.

[78] Fourthly, the taxpayer tried to claim a capital loss in 2010 in respect of the disposal of the Sail shares, before even declaring the capital gain he realised when he disposed of the BCD SA shares, for which part compensation was the issuing of the Sail shares.

[79] Accordingly, so Mr L contended, the taxpayer’s grounds of objection are unreasonable and he should be ordered to pay the costs of the appeal. I disagree. It is so that the taxpayer may have been naïve in blindly following advice from his advisors. Furthermore, it can be said that he should have erred on the side of caution and disclose the tens of millions of rand he realised from the sale of his shares. However, I am not persuaded that his grounds of objection were unreasonable.

[80] Each party should therefore bear his own costs.

Order

Accordingly, I make the following order: -

(1) The appellant’s appeal against the revised assessment for 2009 year of assessment is dismissed.

(2) The respondent is ordered to alter the 2009 assessment in terms of section 129(2)(b) of the Tax Administration Act, 28 of 2011, to reflect a capital gain to be included in the appellant’s taxable income of R3 641 339,58;

(3) The 200% additional tax imposed by SARS in terms of section 76 of the Income Tax Act, Act 58 of 1962 (as it read at the time of imposition thereof), shall be altered and reduced from 200% to 25%;

(4) The interest imposed by SARS in terms of section 89*quat*(2) of the Income Tax Act is confirmed except that it shall be altered to be calculated on the basis of the altered assessment as per prayer (2) above.

(5) The penalty imposed by SARS in terms of paragraph 20 of the Fourth Schedule to the Income Tax Act is remitted *in toto*;

(6) The penalty imposed by SARS in terms of paragraph 20A of the Fourth Schedule to the Income Tax Act is remitted *in toto*;

(7) There shall be no order as to costs.

L R ADAMS
President of the Tax Court
Johannesburg

HEARD ON:	3, 4 and 26 March 2021
JUDGMENT DATE:	23 April 2021